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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINO AMERICANO, S.A. DE C.V.,

Petitioners,

vs.

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.;

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE THE DOMINICAN REPUBLIC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should a United States district court be restrained by principles of comity from issuing a preliminary injunction freezing property of a foreign defendant outside the United States that is unrelated to the plaintiff's claim, when the basis of the injunction is the defendant's payment of *bona fide* claims of foreign creditors in accordance with the debtor-creditor laws of the defendant's foreign sovereign?

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BRIEF OF THE DOMINICAN REPUBLIC, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus, The Dominican Republic, a nation that has long enjoyed friendly relations with the United States, has a compelling interest in this case, because the decision under review is a serious intrusion by the United States courts into the sovereign rights of other nations, particularly their rights to enforce their own debtor-creditor regimes over property of their citizens within their territory.[1]

Like most nations, the Dominican Republic has enacted laws governing debtor-creditor relations, priorities among creditors, insolvency and bankruptcy. Like the United States Bankruptcy Code, these laws regulate the manner in which the limited assets of financially distressed debtors may be allocated among their creditors, either in consensual debt restructurings or formal insolvency proceedings. These rules contain elements of both party autonomy—generally, before the declaration of bankruptcy, a debtor under the law of the Dominican Republic is free to manage its assets and to pay any of its *bona fide* creditors to the exclusion of others—and legislatively prescribed priorities for such obligations as taxes owed to the state, Dominican Republic Civil Code Art. 2098, and wages owed to employees for the past and current year, Dominican Republic Civil Code Art. 2101. Other nations, of course, have similar rules.[2]

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1. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. No party to this action or their counsel authored this brief, in part or in whole. No person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

2. *See* n. 7 *infra*.

The decision of the Second Circuit freezing property outside the United States of a non-United States debtor by means of a preliminary injunction at the behest of a group of United States creditors (to which the district court later added a mandatory injunction ordering the frozen property to be transferred to the same self-selected creditor group)[3] fails even to recognize the existence of the debtor-creditor regime of the nation where the debtor and its property are located, much less extend any comity to that nation's rules or the national interests and policies behind them. The Second Circuit's decision treats the power of federal courts sitting in diversity cases to issue extraterritorial injunctions over property of non-United States defendants outside the United States no differently than their power over property located within the United States. Its opinion contains no suggestion of concern for foreign nations, foreign creditors, foreign laws or international law. There is no indication that the Second Circuit considered the interests of the international community, or of the United States itself, in avoiding conflicts over encroachments on other nations' rights to regulate property in their own territories, despite this Court's many decisions requiring sensitivity and caution when United States courts exercise jurisdiction in ways that impinge on other sovereigns.

These concerns go to the heart of the way United States courts interact with foreign jurisdictions and foreign laws in the ever-increasing number of multi-national disputes that come before them. The Dominican Republic submits this brief to assist the Court in addressing them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has always been sensitive to the interests of foreign nations in its decisions regarding the jurisdiction and

3. Cert. Pet. App. 59a.

powers of the United States courts. In areas ranging from the deference due to acts of foreign governments within their own territories under the act of state doctrine, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), to restricting the scope of personal jurisdiction to avoid unreasonable burdens on the international system, *see Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), to accommodating United States discovery rules to the evidence-gathering systems of foreign states, *see Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987), this Court has recognized that the interests of foreign nations must be carefully weighed in determining how far to extend the reach of United States jurisdiction, procedures and remedies in civil litigation.

Each of these areas involves, in whole or in part, an underlying concern for comity. While " '[c]omity' in the legal sense, is neither matter of absolute obligation, on the one hand, nor mere courtesy and good will, upon the other," *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), this Court has traditionally recognized that comity and the concerns underlying it must be taken into account when United States courts decide disputes that involve foreign nations, foreign persons or foreign property. In deference to these concerns, this Court has determined in a variety of contexts that, even where judicial power may exist in the abstract, its exercise should be limited in order to avoid affronts to other nations that also have an interest in a party to, or the subject matter of, a dispute with transnational connections.

The Second Circuit's decision fails to heed, or even consider, the Court's teachings in this area. Its decision holds that whenever a plaintiff in a United States court can show that a financially distressed foreign debtor is paying its domestic creditors, including government taxing authorities and wage

claims with priority under local law, a United States court may enjoin the foreign debtor from making these payments and freeze any or all of its foreign property to ensure satisfaction of the United States plaintiff's claims. Although the Second Circuit's decision is couched in terms of "irreparable injury" stemming from the "dissipation of assets," Cert. Pet. App. 16a-18a, its opinion makes clear that this "dissipation" was simply the payment by petitioners of the claims of one group of legitimate creditors—the Mexican government, terminated employees, trade creditors and Mexican banks and other financial institutions—rather than another group of creditors. The Second Circuit's remedy for this "preference," which was not shown to be illegal under either United States or Mexican law, was simply to turn it about and prefer the respondents over the Mexican creditors. The Court of Appeals thus sanctioned extraterritorial freezes of the foreign assets of foreign defendants in virtually all cases where a foreign debtor owes more money than it is able to pay.

The effects of this expansive assertion of the injunctive powers of United States courts, if upheld by this Court, cannot be minimized. The Second Circuit's approach allows any creditor who can obtain personal jurisdiction in the United States over a foreign debtor—whether under a debt instrument or otherwise—single-handedly to prevent that debtor from either voluntarily restructuring its indebtedness to its local creditors or acting consistently with the legal priorities and obligations imposed upon it by local law with respect to the repayment of its local debts. Its decision threatens to entangle United States courts in the reorganization of financially troubled foreign corporations even when, as in the instant case, they have no property in the United States and therefore cannot be the subject of either plenary or ancillary proceedings under the United States Bankruptcy Code.

Since the Mexican debt crisis of 1982, numerous countries throughout the world have been required to restructure both their public sector and private sector debt in order to deal with their own economic problems and the fluctuations of the global economy. Upholding the Second Circuit's decision would decisively alter the balance among the parties to such restructurings, by allowing any dissatisfied creditor not merely to obtain a judgment for money due to it, but for all intents and purposes to execute upon that judgment through the use of extraterritorial injunctions directed at the debtor's foreign assets, in derogation of the rights of creditors who do not have the benefit of a United States court order. Nor would the Second Circuit's decision be limited to private sector foreign debtors, for its reasoning could be employed against sovereign debtors as well, thereby undermining the protections afforded foreign states and their agencies and instrumentalities under the United States Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* (1998).

The Court should not allow these results. Extraterritorial injunctions cannot be justified when their rationale and purpose is to prevent foreign debtors from paying legitimate obligations to foreign creditors. At a minimum, such injunctions, which clearly implicate the sovereign power of the nation where the property that is the subject of the order is located, should be limited to situations where the debtor is actually defrauding creditors or secreting its assets. United States courts should not reach into foreign jurisdictions to freeze assets merely so that creditors who sue in United States courts can get a better deal than foreign creditors.

ARGUMENT

THE EXERCISE OF JUDICIAL POWER BEYOND A COURT'S NATIONAL BOUNDARIES MUST BE CONSTRAINED BY PRINCIPLES OF COMITY.

A. Every Nation Enjoys The Right To Exercise Sovereign Power Within Its Territorial Boundaries

This Court has always approached extraterritorial extensions of the powers of the United States with caution. This caution is founded on both considerations of prudence and principles of sovereignty embedded in the law of nations, which has always been considered to be a part of the jurisprudence of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900). Under the classic view of sovereignty, each nation has the exclusive authority to exercise governmental power within its territorial borders:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within it own territories, must be traced up to the consent of the nation itself.

The Schooner Exch. v. McFaddon, 11 U.S. [7 Cranch] 116, 135 (1812) (Marshall, C.J.); *see also Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is

derived."). There can be no doubt here that the property over which the Second Circuit effectively exercised dominion, albeit in the procedural form of an injunction directed *in personam* at the property's foreign owner, was subject to the sovereign power of Mexico, not to the power of the United States.

B. Exercising Judicial Remedies Extraterritorially Implicates Principles Of Foreign Sovereignty And International Comity

The extraterritorial exercise of sovereign power—whether legislative or judicial—threatens to infringe on the sovereign power of another nation, thereby ultimately undermining the sovereignty of all states, including the extraterritorial actor. This Court has therefore moved with circumspection and care in dealing with situations in which the exercise of the power of the United States may result in such infringement. In construing the exercise of the legislative power embodied in Acts of Congress, the Court has held, for example, that legislation prescribing standards of conduct is always to be construed not to regulate beyond the territorial boundaries of the United States unless a contrary legislative intent appears. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282, 285 (1952). This judicial presumption derives from this Court's desire to protect against "unintended clashes between [U.S.] laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

Likewise, the Court has consistently ruled that exercise of the judicial power of the United States should be informed by a respect for the laws and interests of other sovereigns. As the Court long ago recognized:

> The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, *or by judicial decree*, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."

Hilton, 159 U.S. at 163 (emphasis supplied). The principle of international comity refers to the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n. 27 (1987).

> Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.

Id. at 555 (Blackmun, J., dissenting).

The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959). This Court has admonished the lower federal courts to

> demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

Société Nationale, 482 U.S. at 546.

This sensitivity to the sovereign interests of other nations is reflected in a variety of constraints that this Court has recognized on the exercise of judicial power: the doctrines of sovereign immunity (originally recognized by the Court in *The Schooner Exchange* long before it was legislatively codified in the FSIA), act of state, choice-of-law rules, and comity all reflect the self-interest of the United States in respecting, at the overlap of territorial boundaries, the relevant interests of foreign nations. In light of these self-imposed constraints, the Court has developed an entire body of case law for the purpose of guiding the legitimate exercise of judicial power where the potential for conflict with another sovereign exists. *See, e.g., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (deferring to competence of foreign court selected by parties to adjudicate claim); *Romero*, 358 U.S. 354 (declining to impose Jones Act liability on foreign ship where vessel merely passed through U.S. territorial waters); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (deferring to competence of arbitral tribunal); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (deferring to competence of foreign courts to resolve transnational claims).[4]

The Court of Appeals ignored this long tradition of caution when it upheld a wholesale extraterritorial freeze of a foreign defendant's property without any consideration for principles of comity or the interests of the foreign sovereign of the territory where the property was located. Although the Second Circuit made a brief reference to the principle that "injunctive relief seeking to prohibit conduct outside the district court's jurisdiction should be 'exercised with great reluctance,' " Cert. Pet. App. 7a-8a, the Court of Appeals in truth exhibited no reluctance at all to found a broad extraterritorial injunction

4. These constraints are, of course, in addition to those required by constitutional principles of federalism in the interaction of United States courts with the sovereignty of the states and state judiciaries.

solely on the existence of *in personam* jurisdiction over the defendant debtor and the broad powers that it found to be implicit in Rule 65 of the Federal Rules of Civil Procedure. It did not discuss, or apparently consider, the problems created by a court exercising its power within the territory of another sovereign nation identified long ago by the Second Circuit itself:

> We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.

Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956). Instead, it permitted an injunction to freeze the foreign assets of a foreign corporation in the midst of restructuring its debt, without regard for the interests of the foreign defendant's sovereign or its local creditors, in a manner calculated to make such restructurings in other cases more difficult or impossible.

C. Exercising Judicial Control Over Extraterritorial Assets In The Context Of A Financially Troubled Foreign Company Threatens To Conflict With Local Authority And Reorganization Regimes

The effect of the district court's order was first to freeze—and later to order the transfer of—the petitioners' principal assets in Mexico, thereby making their property unavailable to pay claims of petitioners' other creditors, including tax claims by the Mexican government, severance claims of Mexican employees and claims of Mexican bank creditors, that in the

aggregate were considerably greater than the claim held by respondents. Cert. Pet. App. 4a. The record reflects that petitioners were in financial distress and were seeking to negotiate the restructuring of their debt to Mexican and foreign creditors alike. The record also reflects that petitioners' five largest creditors, the Mexican government, Mexican banks, Mexican financial institutions, trade creditors and terminated employees, held obligations with a value six times greater than those held by the group of United States creditors whose interests the district court's order was designed to protect. *Id.*

Many nations, including Mexico and a number of other countries in Latin America, do not have a statutory framework like Chapter 11 of the Bankruptcy Code for reorganizing financially troubled companies under judicial supervision rather than liquidating them.[5] Instead, companies in these countries that need to restructure their debts must typically conduct private negotiations with all interested parties to arrive at a consensual solution. Litigation remains a possibility in these countries for enforcing creditor rights, but the practical impediments to realizing on the debtor's limited assets in most cases channel creditor choice toward either negotiation with the debtor or forcing liquidation proceedings. Such negotiations are of course informed by the statutory priorities mandated by the debtor-creditor laws and insolvency laws of the debtor's sovereign, which would be applied if liquidation occurred.

These priorities, and more generally, the debtor-creditor regimes of which they are a part, reflect the policies of the

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5. *E.g.*, The Dominican Republic, Guatemala, Uruguay, and Chile. Mexico, for example, has a provision for suspension of payments (*suspension de pagos*) as part of its bankruptcy law, *see* Mexican Bankruptcy Law Arts. 408-411, but it is seldom used because a suspension request must be accompanied by a completed restructuring agreement and is otherwise subject to significant practical restrictions.

nation where the debtor and its property are located. With their preference for voluntary debt restructurings negotiated between a debtor and its creditors, whether domestic or foreign, they are entitled to the same respect, as regards property within that nation's territory, that the United States would expect United States bankruptcy policies and priorities to be accorded by foreign sovereigns with respect to property in this country.

The Second Circuit's extraterritorial freeze decision is the antithesis of this kind of respect for the operation of foreign legal regimes within the territories of foreign states. By preventing payment of foreign debts to foreign creditors out of the debtor's foreign property, it disregards the debt priority schemes of foreign law. More generally, it subverts the reorganization regimes of foreign countries with respect to assets within their jurisdiction. If a United States court can exercise the power to freeze all assets of a foreign company, based solely on its submission to personal jurisdiction with respect to a particular credit agreement, the court effectively freezes the restructuring process for all creditors, irrespective of their priority or status. The Court of Appeals' decision permits United States creditors to hold the reorganization process of a foreign company hostage, even when, as here, most of its creditors (and all of its priority creditors) are foreign and no resolution of its debts would be possible in any United States proceeding.[6]

6. Since, as in this case, litigation over loan agreements will typically not support federal question jurisdiction, the only creditors who could sue a private foreign debtor in federal court and obtain the kind of preliminary relief granted here are United States citizens, as the joinder of any alien creditors as plaintiffs would defeat diversity jurisdiction. 28 U.S.C. § 1332(a)(2). Inasmuch as foreign debtors are likely to have at least as many foreign creditors as United States creditors, no United States district court will have before it all the creditors necessary to effect a complete resolution of the debtor's obligations, even if it were otherwise appropriate for a district court to act in effect as an insolvency tribunal for a foreign debtor that could not be the subject of United States bankruptcy proceedings.

Nor can the Second Circuit's "irreparable injury" rationale for acting in a manner so destructive of respect for foreign nations' legal regimes and foreign debtors' debt restructuring efforts withstand analysis. The Second Circuit ruled that the petitioners' payment of other creditors was a "dissipation" of assets that caused irreparable injury to the respondents justifying the grant of preliminary injunctive relief. To reach this result, it distinguished its prior decision in *Chemical Bank v. Haseotes*, 13 F.3d 569, 572-73 (2d Cir. 1994) (per curiam), which held that an irreparable injury cannot be shown when the transferor legitimately sought to pay off creditors, rather than frustrate an eventual judgment. But here, according to the Second Circuit, the debtor "was improperly establishing a priority of creditors." This reasoning was gravely flawed.

In fact, the "less than benign" actions attributed to petitioners by the Court of Appeals—"establishing a priority of creditors" that did not give respondents first place, Cert. Pet. App. 18a—were perfectly legitimate. As a general principle of Mexican law, as is the case in many countries,[7] before a company is declared bankrupt by a judicial authority,[8] it is free to manage its assets and to pay any of its *bona fide* creditors to the exclusion of others. There is no suggestion in the record that any of petitioners' Mexican creditors were not *bona fide*, and the petitioners were therefore entirely within their rights in paying the legitimate claims of these creditors. Indeed, under New York law as well, which governed the notes held by respondents, it is completely permissible for a debtor, outside

7. *E.g.*, Argentina: Civil Code Arts. 31, 35, 52, 53, Bankruptcy Law Arts. 16, 107; Chile: Civil Code Art. 1446, Bankruptcy Law Arts. 64, 72; Mexico: Civil Code Art. 1798, Bankruptcy Law Arts. 83, 408-411; Peru Civil Code Arts. 3, 76; Legislative Decree 845, arts. 19, 118.

8. In the case of Mexico, a company's freedom to manage its assets will also be restricted once it has filed for suspension of payments.

of bankruptcy, to pay one *bona fide* creditor rather than another. *Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A.*, 599 N.Y.S. 2d 816, 819, 191 A.D. 2d 86, 90-91 (1st Dep't 1993). The only body of law that would proscribe an insolvent debtor's paying one creditor in preference to another would be the United States Bankruptcy Code (and only to the extent of providing, in certain circumstances, for the debtor in possession or bankruptcy trustee to recover preferential payments for the benefit of all of its unsecured creditors, *see* 11 U.S.C. § 547), but petitioners neither were nor could have been the subject of any case or proceeding under the Bankruptcy Code.

Not only were any payments that may have preferred certain *bona fide* creditors over others permitted under the laws of Mexico and most other countries, including the United States, but the "priority of creditors" that the Court of Appeals decried was *required*, to a significant extent, by Mexican law. Section XXIII of Article 123 of the Mexican Constitution expressly creates a super-priority in favor or workers and employees for salaries due during the year preceding bankruptcy. In addition, the Mexican fiscal code establishes a priority in favor of tax liabilities. C.F.F. Art. 149.[9] These types of legislative priorities in allocating the limited assets of financially distressed debtors are fundamental aspects of Mexican debtor-creditor law, as they are under the legal systems of most nations.

9. In this respect, Mexico is no different from most other countries of Central and South America that have a priority structure established by law. *See, e.g.*, Dominican Republic: Civil Code Arts. 2092-2113, Code of Commerce Arts. 546-548; Guatemala: Code of Civil and Merchant Procedure Arts. 379-397, Code of Commerce Arts. 233, 682, 872; Peru: Civil Code Arts. 1118-1131, 1055-1090, Legislative Decree 845 of Sept. 21, 1996 Art. 24; Uruguay: Civil Code Arts. 2368-2371, Code of Commerce Arts. 1732-1760; Argentina: Civil Code Arts. 3875-3938, Bankruptcy Law Arts. 239-250; Chile: Civil Code Arts. 2465-2491. Nor is it unlike the priority system prescribed in the United States. *Cf.* United States Bankruptcy Code § 507.

The fact that the Court of Appeals viewed as an "improper[ ] . . . priority" a Mexican debtor's decision to follow Mexican law and pay Mexican taxes and Mexican employees ahead of United States lenders speaks volumes for its parochial vision and failure to extend comity to another nation's legal regime over property in the foreign state's territory. One can readily imagine how the United States would view a foreign court's decision that a United States national's payment of federal and state income taxes "improperly" created a "priority" at the expense of foreign creditors, so as to justify the foreign court in enjoining further use of the debtor's United States property for such "improper" purposes. Yet the Second Circuit gave no thought whatever, it seems, to the comity implications of its disdainful characterization of a Mexican debtor's compliance with its obligations to pay taxes to its own sovereign in Mexico, pay wages and severance to its employees and pay the other legitimate claims of its local creditors out of its local property.

Finally, and perversely, the lower court's injunctive "remedy" sequestering the debtor's foreign property simply reversed the "preference" posited by the Court of Appeals, by preferring United States creditors over non-United States creditors with respect to property located outside the United States and otherwise available to satisfy foreign creditors' claims. The freeze of petitioners' assets effectively prevented satisfaction of the claims of Mexican creditors until the claims of the United States creditors were decided. When the district court then took the next step and ordered the assets to be transferred to the United States creditors, it effectively converted the unsecured United States creditors[10] into fully

10. There is no dispute that respondents are unsecured creditors: "Both the Notes and the Guarantees are unsecured obligations that rank *pari passu* with all other present or future unsecured and unsubordinated indebtedness of GMD." Cert. Pet. App. 3a.

secured creditors. That the lower court failed even to address the impact of this exercise of power over foreign property on the interests of either Mexico or Mexican creditors is symptomatic of its disregard for the "spirit of cooperation" required when a court "approaches the resolution of cases touching on the laws and interests of other sovereign states." *See Société National*, 482 U.S. at 544 n. 27.

In the last analysis, comity requires self-restraint. In a world of independent sovereigns, each with its own laws over persons and property within its territory, self-restraint is essential to preventing collisions between nations and allowing the international legal system to function in a way that accommodates the interests of all of its legitimate actors. Here, the Second Circuit failed to exercise such restraint. Considerations of international comity make it inappropriate for United States courts to issue orders that, in effect if not in name, exercise jurisdiction over property outside the United States belonging to non-United States defendants when the defendants have done no more than pay their *bona fide* debts to their local governmental and private sector creditors in accordance with local law.

D. Extraterritorial Application Of Such Injunctions With Respect To Foreign Sovereign Assets Would Undermine The FSIA

Permitting extraterritorial injunctions under these circumstances could have particularly dramatic implications for actions brought in the United States against foreign *sovereign* debtors. Since the Mexican debt crisis of 1982, foreign sovereign debtors that have restructured their external indebtedness have been sued in the United States federal courts by dissatisfied creditors seeking to strengthen their hands in

the restructuring process.[11] The standard employed by the Second Circuit to freeze assets outside the United States under Rule 65 could easily be used to undermine the protections afforded foreign states under the FSIA.

Under the FSIA, the power of United States courts to attach property of foreign states and public sector corporations prior to the entry of judgment is narrowly limited to circumstances in which the foreign state or state corporation has explicitly waived its immunity from pre-judgment attachment and, if there has been such a waiver, only to property used for commercial activity in the United States. 28 U.S.C. § 1610(d). A pre-judgment freeze of the foreign state's property in its own country would completely circumvent the limitations on attaching or otherwise interfering with the foreign state's assets located in the United States. Similarly, allowing post-judgment mandatory injunctions requiring a foreign state to transfer to the United States its property located abroad would also subvert the requirement in the FSIA that the only property subject to execution in this country is property already located here and used for a commercial activity in this country. *Id.* at § 1610(a), (b).

The Court of Appeals decision could be used by aggressive creditors to undermine and circumvent these Congressional restrictions on attachment of foreign states' property, because it is explicitly couched in terms of injunctive power under Rule 65 rather than attachment under Rule 64, and holds that even when no basis for attachment exists under Rule 64, injunctive relief under Rule 65 may be granted under that court's expansive irreparable injury rationale. While we believe that existing

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11. Cases currently pending or just recently concluded involving creditor claims against foreign sovereign debtors in the United States District Court for the Southern District of New York alone include suits against Ecuador, Peru, Panama, and The Philippines.

construction of the FSIA should preclude these efforts, the Court of Appeals decision creates uncertainty of a kind calculated to produce grave friction with foreign states unless this Court provides clear guidance to the contrary. The Court should therefore make it clear that the Court of Appeals decision, even if it should otherwise be affirmed, does not license extraterritorial injunctions directed to property of foreign states located outside the territory of the United States.

E. The Existence Of *In Personam* Jurisdiction Does Not Alleviate The Need To Consider Principles Of Comity

The Second Circuit satisfied itself that the district court had authority to order an extraterritorial injunction solely on the basis of *in personam* jurisdiction over petitioners. However, the ability to exert sovereign power over a litigant and its assets, wherever located, is not, and never has been, sufficient to warrant the exercise of such powers to the exclusion of principles of comity.

Whether a court may assert *in personam* jurisdiction over a foreign litigant, in the first instance, and, having done so, whether the full panoply of judicial power should be exercised with respect to that foreign litigant are questions that must be answered in a fashion consistent with principles of comity. Thus, *Asahi* teaches that in determining whether a court may exercise *in personam* jurisdiction over a foreign defendant, " '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). Such care and reserve requires:

> careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and

> an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

Id.

Moreover, even after *in personam* jurisdiction has been established, a court must nevertheless consider principles of comity: this Court has required courts to undertake a particularized analysis of the respective interests of the foreign nation before imposing the discovery regimen of the United States Rules of Civil Procedure where such a regimen would infringe on the sovereignty of that foreign nation. *Société Nationale*, 482 U.S. at 544.

Similarly, this Court has on occasion considered whether the exercise of certain judicial remedies merely because of the existence of personal jurisdiction might be inappropriate in certain circumstances:

> The word, "jurisdiction," is in this connection somewhat equivocal; in one sense the judge had it; the bank had personally appeared and was subject to his orders, as far as any corporation can be; [the judge] might sequester its property in Vermont, if he could find any, or he might proceed against its officers as for a contempt. But although [the judge] thus had the power to prevent the defendant from asserting its rights in Maine, it might still be improper for him to do so. Courts do not always exert themselves to the full, or direct parties to do all that they can effectively compel, and such forbearance is sometimes called lack of "jurisdiction."

United States v. First Nat'l City Bank, 379 U.S. 378, 388 (1965) (dissent quoting Judge Learned Hand in *Amey v. Colebrook Guaranty Sav. Bank*, 92 F.2d 62, 63 (2d Cir. 1937)).

The exercise of sovereign power with respect to assets located within the territory of another sovereign nation presents unique problems. It is qualitatively different from the regulation of a narrow range[12] of extraterritorial *conduct* when the impact of such conduct falls within the United States. Whereas regulating the conduct of a party, vis-à-vis its relationship with the United States, will often have a minimal impact on the foreign country in which the party is located and the citizens of that nation, affecting the status of property within another nation has serious implications for that nation and third parties. To prohibit a person's ability to take actions with respect to property is to define that person's interest in that property. To affect property, and title thereto, necessarily conflicts with local authority because it constricts and changes the rights appertaining to the property that had been recognized by the local authority. Even in the context of extraterritorial regulation of conduct, sovereign power is limited to the extent that it conflicts with the local authority. *Murray v. Schooner Charming Betsy*, 6 U.S. [2 Cranch] 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.").

Although *United States v. First National City Bank*, 379 U.S. 378 (1965), has been cited for the proposition that a court with '*personam*' jurisdiction over a party has the authority to freeze property under its control, whether the property be located within or without the tribunal's territorial jurisdiction, that case is distinguishable. In *First National*, the party enjoined was a United States citizen—a banking corporation chartered

12. Restatement (Second) of Foreign Relations Law of the United States § 402.

by the federal government. By contrast, petitioners here are foreign citizens. *First National* also involved a defendant that was removing its property from the United States to defeat a tax lien by the Government on that very property, while here there is no evidence that petitioners ever had property in the United States. Moreover, the majority in *First National* considered whether the district court's order would violate local law. *First Nat'l*, 379 U.S. at 384. Although petitioners consented to personal jurisdiction of the United States court, they did so for the sole purpose of adjudicating claims arising out of certain financial instruments. Adjudication of those claims is separate and distinct from the exercise of judicial control over the rights and interests of the foreign party in assets located outside the court's jurisdiction and wholly unrelated to the claims to which petitioners submitted themselves to the authority of the court to resolve.

Nor is the exercise of such a power necessary. Indeed, its exercise is unusual[13] and reflects an erosion of the traditional method of enforcing a judgment on property located outside the jurisdiction of the court: taking the judgment to the jurisdiction in which the property in question is located. If Rule 65 were to provide United States courts with the ability to freeze assets outside the jurisdiction of the court, pending the outcome of the action for purposes of insuring satisfaction of a potential judgment, there would be no logical barrier to then simply ordering a defendant to transfer the same assets into the jurisdiction to satisfy a final

13. Although the Second Circuit points to English Mareva injunctions as an example of similar equitable relief, Cert. Pet. App. 15A, unlike the case before the Court, the exercise of English judicial power over assets outside the jurisdiction, in recognition of the *in rem* affects of such orders on third parties, has been limited to a few extraordinary cases, typically involving fraud. *See, e.g., Babanaft Int'l Co. S.A. v. Bassatne* [1990] Ch 13 (Eng. C.A.); *Republic of Haiti v. Duvalier* [1990] QB 202 (Eng. C.A.); *Derby & Co. v. Weldon* [1990] Ch 48 (Eng. C.A.); *Derby & Co. v. Weldon* (nos. 3 and 4) [1990] Ch 65 (Eng. C.A.)

judgment.[14] That is indeed what occurred in the present case, where after finding petitioners liable to the plaintiffs and entering judgment in their favor, the district court issued a further mandatory injunction ordering petitioners to assign their rights in one of their principal assets, government notes issued to petitioners by the United Mexican States, to their United States creditors. Cert. Pet. App. 58a-59a.

Principles of comity and sovereignty demand that assertions of United States judicial power over property outside the United States must be limited. If this Court is prepared to recognize such an extraterritorial power in special circumstances, the exercise of this power should be narrowly limited to circumstances where a party is defrauding creditors or secreting assets. Extraterritorial injunctions should not be permitted because a foreign debtor is paying legitimate debts to *bona fide* foreign creditors in accordance with the law of its own nation.

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14. With respect to the FSIA, under the Second Circuit's test, which would require nothing more than the waiver of sovereign immunity and consent to jurisdiction routinely included in sovereign lending agreements, creditors of foreign states could fundamentally alter the debtor-creditor and inter-creditor relationship by bypassing the very protections Congress conferred on foreign sovereigns with respect to prejudgment attachments of their assets.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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